Supreme Court, U.S.
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No. 97-1105

In The Supreme Court of the United States

OCTOBER TERM 1997

KAREN and MICHAEL DERZACK,

Petitioners,

v.

ALLEGHENY COUNTY CHILDREN AND YOUTH SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

THE SUPERIOR COURT OF PENNSYLVANIA DID NOT ABUSE ITS DISCRETION BY REJECTING PETITIONERS' CLAIM THAT THEY WERE DENIED DUE PROCESS OF LAW PURSUANT TO THE LOWER COURT'S REMOVAL OF TWO FOSTER CHILDREN FROM THEIR CARE.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Introduction

This fact-based case concerns the court-ordered removal of two foster children, Byron and Byrae Griffin, from the home of foster parents, Michael and Karen Derzack (the Derzacks). A three-judge panel of the Juvenile Court removed the children from the Derzacks' care on January 17, 1996 after hearing extensive testimony on two separate occasions concerning the Derzacks' flagrant violations of several court orders. The Superior Court of Pennsylvania upheld the lower court's decision to remove the children based upon the Derzacks' violations of court orders which prohibited them from exploiting these children through the media including tabloid television, refusing to allow a Children and Youth Services (CYS) caseworker to visit the children, terminating the children's psychological therapy, refusing to correct false statements on their adoption application and petition concerning Mrs. Derzack's mental health history and the couple's annual income, leaving the jurisdiction without permission and interfering with court-ordered visitation with the children's natural relatives. The Superior Court agreed that the Derzacks' violations were

harmful to these children and that their best interests were served by removal and placement in a pre-adoptive home.

B. Procedural History

Byrae and Byron were born drug-addicted to LaShawn Jeffrey on July 20, 1991, and July 15, 1992, respectively. Their natural father, Todd Griffin, is deceased. (3A)[1]

Byron was initially placed with the Derzacks shortly after his birth. (5A) Byrae was placed with relatives. (4A) Byrae was eventually reunited with her natural mother in June of 1993 and Byron was removed from the Derzacks by court order and reunited with his mother in December 1993. (8A)

On October 6, 1994, the lower court placed Byron and Byrae with the Derzacks as potential adoptive parents after their natural mother relapsed by using crack cocaine. (10-11 A) In April of 1995, their natural mother's parental rights were involuntarily terminated by the lower court. (12A)

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[1]The designation "A" preceded by page numbers indicates location in the Appendix to the Petition for Writ of Certiorari.

From April of 1995 through December of 1995, the Derzacks violated a series of eight (8) court orders designed to protect the children's best interests. (9-15A)

Pursuant to the Derzacks' flagrant, pre-meditated violations of these court orders, CYS filed four (4) contempt petitions with the lower court over a period of several months. (26 A)

In the last petition, which was properly served upon all parties on December 6, 1995, CYS asked the lower court to determine whether placement with the Derzacks was in the best interests of Byron and Byrae. (26 A)

A contempt hearing was held on December 13, 1995. At that hearing, CYS demonstrated that the Derzacks had terminated the children's visits with their natural relatives, exposed the children to several tabloid television talk shows, prohibited CYS from visiting with and monitoring the children, travelled with the children to the state of California without court or CYS permission, unilaterally terminated the children's psychological therapy and provided false statements on their adoption application and petition. (30-32 A)

At the December 13, 1995 hearing CYS requested the children be removed from the Derzacks' care, arguing that

their best interests were not served by this family and that they were unfit to adopt them. (28A)

At a second scheduled hearing held on January 17, 1996, Pine township Police Officers testified to two incidents in November and December of 1995 of reported intoxication on the part of Mr. Derzack. A CYS caseworker testified once again to his concerns for Byron and Byrae living with the Derzacks. (74-75 A)

At the conclusion of the January 17, 1996 hearing, the lower court removed the children and placed them in a pre-adoptive home. (154 A)

The Superior Court of Pennsylvania, in a thorough and well-reasoned opinion, denied the Derzacks' appeal on February 19, 1997 flatly rejecting any alleged due process violation. (24-28 A)

The Supreme Court of Pennsylvania refused to grant the Derzacks' Petition for Allowance of Appeal of the Superior Court's order on September 8, 1997. (1 A)

The children were adopted on December 16, 1997 by their pre-adoptive foster family where they have now resided for over two years.

REASONS FOR DENYING THE PETITION

Rule 10 (a)-(c) of the U.S. Supreme Court Rules outlines the "...character of the reasons [this] Court considers" in granting a review of a writ of certiorari as follows:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Subsection (a) of Rule 10 is not applicable to this Petition as this case is a state court case and not a United States court of appeals decision.

Subsection (b) is not applicable here. Though the Derzacks allege a violation of due process, this fact-based case is not the case upon which this Court should determine the threshold federal question of whether the due process protections of the Fourteenth Amendment include foster parents. Neither is the lower court's decision here in conflict with any state court of last resort, nor of a United States court of appeals.

Subsection (c) is not applicable because the Superior Court's decision to uphold the lower court's removal of two foster children from the care of the Derzacks is not an important federal question that should be settled by this Court, nor does the Superior Court's decision conflict with any relevant decisions of this Court. In fact, the

Superior Court's decision is in accordance with relevant decisions of this Court. *See* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094 (1977) *infra.* And, as outlined below, the peculiar facts of this case argue against this Court granting certiorari to determine whether foster parents have a "liberty" interest in their foster children, and correspondingly, what process is due.

Pursuant to the dictates of the above rule, Respondent, Allegheny County Children and Youth Services presents the following reasons in support of its request to deny the Derzacks' petition.

A. Substantive Due Process

The Derzacks argue that they have a fundamental liberty interest in the care and custody of two foster children pursuant to the Fourteenth Amendment to the United States Constitution which states in part..."nor shall any State deprive any person of life, liberty, or property, without due process of law." They cite no authority for this argument, but suggest that their interests are akin to those of a natural parent. They attempt to buttress their fallacious argument by citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982), however, the due process protections outlined in

Santosky apply to natural parents, not foster parents nor adoptive foster parents. The Court also stated that the nature of due process was a balancing of the private interests of the natural parent, risk of error in the deprivation by the state and the countervailing government interest in the best interests of the child. *Id.* at 754. The Derzacks cite no authority for the balancing of those interests here.

Though Santosky clearly applies to the "liberty" interest that biological parents have in their children, do foster parents have any asserted interests within the "liberty" protected by the Fourteenth Amendment? This Court spoke narrowly on this issue in Smith v. Organization of Foster Families for Equality and Reform, *supra*, 431 U.S. 816 (1977). In Smith, this Court declined to expand to foster parents a constitutionally protected liberty interest stating that "... there are also important distinctions between the foster family and the natural family...[T]he State...seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements." at 845, 2110. In addition, this Court denied an application for writ of mandate by a couple seeking reinstatement as prospective adoptive parents after the state had removed the child without notice in the child's best interests. Martin v. Thies, 446 U.S. 1320, 100 S.

Ct. 1744 (1980). Clearly, based upon the above authorities, the Derzacks have no fundamental liberty interest in these children and their substantive due process argument must fail.

B. Procedural Due Process

Even if one assumes *arguendo* that foster parents have a limited constitutionally protected liberty interest in their foster children, the Derzacks were provided with more than adequate notice and an opportunity to be heard before the lower court removed the children. As the Smith Court noted, "[i]t is true that '[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing....' " *Id.* at 848, 2111. The Derzacks make the specious claim that they had no notice that these children could be removed from their care, and that they had no opportunity to defend themselves. The Superior Court of Pennsylvania flatly rejected their claim.

Initially, the Superior Court noted that the Derzacks entered the case as foster parents who were on notice that the state agency has the authority to remove a child at any time. (A.25).

The Superior Court went on to illustrate that Byron had been removed from the Derzacks in December of 1993 in order to be reunited with his natural mother. The Derzacks,

who were at that time considered to be prospective adoptive parents by the court, never challenged that order on due process grounds because they knew the Juvenile Court had the power to remove the child. (26A)

Indeed, the Derzacks do not deny that the Juvenile Court has broad authority to adjudicate in the best interests of dependant children pursuant to 42 Pa. C.S.A. Section 6301 *et. seq.* which must include the power of removal. As the Superior Court noted, [w]ithout that power, Juvenile Court's authority would be illusory." (27A). As further evidence that the Derzacks were well aware that removal of these children was an option, the Superior Court next stated that no less than four contempt petitions were filed against the Derzacks for their violations of court orders from July 1995 to December 1995. (26 A) In fact, the final contempt petition served prior to the December 1995 hearing asked the court to make a determination whether placement with the Derzacks was in the best interests of these children.

The Superior Court further found that the Derzacks' claim of lack of notice was not credible, because the lower court specifically discussed the issue of removal at the court hearing held December 13, 1995. (28 A) In fact, the Derzacks' own attorney argued that removal would not be in the best interests of the children. (28A). Thus, their specious

arguments are plainly disingenuous, and do not comport with the facts.

Finally, the Superior Court found that the Derzacks were represented by competent counsel at the December 1995 and January 1996 contempt proceedings and "...were provided every opportunity to explain or defend their conduct." (28A) Indeed, the Derzacks testified extensively and mounted a vigorous defense of their obdurate conduct in two separate hearings. In fact, both the Juvenile and Superior Courts found that the Derzacks' testimony was "coy and evasive" and that it subjected the lower court to ridicule. (35-36 A) Having failed to do so adequately, [the Derzacks] cannot now complain that they were unaware of the intended purpose of the contempt hearings or that they were denied the opportunity to be heard. (28A).

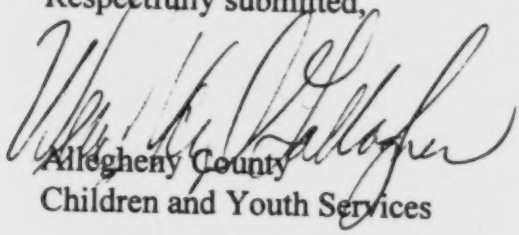
Truly, one is left wondering how the Derzacks can believe that they can rehabilitate themselves, after testifying in the face of overwhelming evidence to the contrary, that they did not violate any court orders (A 36), that they "can't speak for the future" regarding further violations of court orders (A 39) and by taking the Fifth Amendment regarding their federal income tax problems (A 64-65).

In essence, the Derzacks are asking this Court to remove two adopted children from the adoptive parents who have parented them for over two years, and return them to two former adoptive foster parents who subjected these children to tabloid media and general turmoil, and who exploited them in an effort to manipulate the child welfare system for their own mysterious purposes. Their due process claim has no basis in law or fact and fails to present a compelling reason for review by this Court, and thus, should be denied.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the Derzacks' Petition should be denied.

Respectfully submitted,



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